THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

May 21, 1973

Honorable Frank J. Lombardino
Chairman, Committee on Liquor Regulation
House of Representatives
Austin, Texas

Letter Advisory No. 44

Re: H. B. 721-establishing the responsibility for the distribution of beer in specific areas

Dear Representative Lombardino:

You have requested an opinion on the constitutionality of H. B. 721, as amended, which would add to the Texas Liquor Control Act (Articles 667-1 et seq., Vernon's Texas Penal Code) a Section 2b as follows:

> "Section 2b. Each holder of a manufacturer's or nonresident manufacturer's license shall assign to each holder of a General or Local distributor's license to whom it makes sales a sales area or territory within which each such distributor shall be the sole distributor of the brand or brands of such manufacturer; provided that if any such manufacturer manufactures more than one brand of beer it may assign sales areas or territories to additional distributors for the distribution and sale of such additional brand or brands, so long as not more than one distributor distributes and sells the same brand or brands within the same sales area or territory. No distributor shall distribute or sell a brand of beer in any area or territory other than the area or territory assigned to such distributor; provided, however, that nothing herein shall prevent a General or Local Distributor from selling a brand or brands to another General or Local Distributor in a different sales area or territory so long as the purchaser is authorized to distribute and sell such brands in said sales area or territory; and provided further, nothing herein shall prevent a General or Local Distributor from distributing or selling a brand of beer in a specific territory

> not assigned to him if such distributor is requested to do so by the manufacturer of such brand and the distributor of such brand to which such territory is assigned, in order to take care of an emergency situation and to insure the orderly and uninterrupted distribution of a brand of beer in such territory.
>
> "Section 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each be suspended, and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage."

The effect of this legislation would be to restrict the distribution and sale of a brand of beer to exclusive sales territories or areas established by the manufacturer and to sale to exclusive distributors within such areas. The most obvious question raised regarding the constitutionality of this bill is whether it creates a monopoly in violation of Article 1, Section 26, Texas Constitution, which provides that monopolies are "contrary to the genius of a free government, and shall never be allowed."

The Supreme Court of Texas in City of Brenham v. Brenham Water Co., 67 Tex. 542, 44 S. W. 143, 153 (1887) defined a "constitutional monopoly" as "a grant which gives to one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment . . . . " See also Jones v. Carter, 101 S. W. 514, 516 (Tex. Civ. App., 1907, err. ref.). The monopolies denounced by the Constitution are those created by the State or by a political subdivision of it. 38 Tex. Jur. 2d, Monopolies, Combinations, etc., Section 2. Thus, the Legislature is prohibited from enacting legislation which would create a "monopoly."

Texas authorities have established that the granting and accepting by contract of the exclusive right to sell a manufacturer's product within a given territory is a conspiracy in restraint of trade in violation of the anti-trust statutes. Anheuser-Busch Brewing Ass'n. v. Houch, 88 Tex. 184, 305 S. W. 869 (1895); American Brewing Co. Ass'n v. Woods, 215 S. W. 448 (Tex. Comm. App., 1919); Grand Prize Distributing Company v. Gulf

Brewing Co., 267 S. W. 2d 906 (Tex. Civ. App. 1954, err. ref.); Climatic Air Distrib. of So. Tex. v. Climatic Air Sales, 345 S. W. 2d 702 (Tex. 1961) and Sherrard v. After Hours, Inc., 464 S. W. 2d 87, 89 (Tex. 1971).

" . . .[A] state legislature cannot, under the guise of the police power, create a monopoly in any trade, occupation . . . the prosecution of or dealing in which is the common right of all citizens upon equal terms." 54 Am. Jr. 2d, Monopolies, etc., Sec. 500, p. 953. We thus think that the exclusive contractual right to sell a manufacturer's product within a given territory as accorded by House Bill 721 would be a restraint of trade and a monopoly beyond the power of the Legislature to create.

It has been suggested that the 21st Amendment to the Constitution of the United States might authorize creation of such restraint and monopoly. It reads, in part:

> "Sec. 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Article 16, Section 20a, of the Texas Constitution now provides:

> " . . . The Legislature shall also have the power to regulate the manufacture, sale, possession, and transportation of intoxicating liquors, including the power to establish a state monopoly in the sale of distilled liquors." (Emphasis added).

Undoubtedly the provisions of both constitutions give the State broad powers to regulate the liquor industry even to the extent of creating a state monopoly of the sale of beer. See State Board of Equalization of California v. Young's Market Co., 299 U.S. 59, 57 S Ct 77 (1936).

At least seventeen states are "monopoly" states, that is, states in which liquor is sold by the State itself and not by private enterprises. Joseph E. Seagram & Sons Inc. v. Hostetter, 86 S Ct 1254, 1260, 384 U.S. 35 (1966) and Baumer v. Franklin County Distilling Co. Inc., 135 F 2d 384 (6th Cir. 1943, cert. denied 64 S Ct 54, 320 U.S. 750, 88 L ed 446). This type of regulation has been recongnized to be within the police power of the State. Ajax v. Gregory, 32 P 2d 560 (Wash. 1934) and Harrison v. Wyoming Liquor Commission, 177 P 2d 397 (Wyo. 1947); 58 C.J.S. 7-Monopolies.

In State v. City Council of Aiken, 20 S. E. 221, 228 (S. C. 1894), the court in construing a state statute establishing exclusive sale of liquor by the State held that the Act did not establish a monopoly: "The doctrine of 'monopoly' cannot be applied to a state in exercising its governmental functions."

The authority of a State to regulate the sale of liquor, even to the extent of creating a monopoly in itself, in no way permits it to create a monopoly in private enterprise directly contrary to Article 1, § 26. In the first instance, the State is exercising it police power and its powers under the Twenty First Amendment to regulate the liquor industry. In the second instance, it is creating an exclusive, separate, public privilege in a private group. It is our opinion, therefore, that House Bill 721, if enacted, would be held unconstitutional.

It has been suggested that the past cases invalidating exclusive territories such as Grand Prize Distributing Co. v. Gulf Brewing Co., 267 S. W. 2d 906 (Tex. Civ. App., San Antonio, 1954, err. ref'd.) were based on the anti-trust statutes and not on Article 1, § 26 of the Constitution. From this the conclusion is drawn that: "Therefore, these cases merely hold that such agreements violate the Texas anti-trust statutes."

However, just as there is no case invalidating a commercial monopoly on the grounds of violation of Article 1, § 26, so it is equally true that there is no case upholding one.

We agree that Article 16, § 20 authorizes the creation of a state monopoly in the sale of "distilled liquors."

However, there is nothing in that section that suggests to us that the people of Texas through their Constitution, while approving sale in state stores (and that's what a state monopoly means) would authorize sale through private monopolies (as House Bill 721 would provide) and we can see no conflict, actual or potential, between the two constitutional provisions.

In our function of interpreting the law we are bound by the ordinary meaning of written words except insofar as the words have been interpreted and given different meaning by court decisions binding upon us. There has been no such interpretation of Article 1, § 26. We are unable to ascribe to

the words "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . " any meaning other than that the Legislature may not create or permit any monopolies.

In fact, the one time the constitutional provision was before the courts under facts involving an exclusive territory for a distributorship, the court held it was a bar. After Hours Inc. v. Sherrard, 456 S. W. 2d 227 (Tex. Civ. App., Austin, 1970) reversed on the Supreme Court's finding that the facts did not show such exclusive territory. Sherrard v. After Hours, Inc., 464 S. W. 2d 87 (Tex. 1971).

We are constrained to be of the opinion, therefore, that House Bill 721, if enacted, would be held unconstitutional as conflicting with the provisions of Article 1, § 26 of the Texas Constitution that no monopoly shall ever be allowed.

Very truly yours,

John L. Hill

JOHN L. HILL
Attorney General of Texas

APPROVED:

LARRY F. YORK, First Assistant

DAVID M. KENDALL, Chairman
Opinion Committee